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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1679

MARY C. HACKETT AND JOHN J. AFFLECK,

Petitioners,

vs.

GRINNELL CORPORATION,

Respondent.

No. 73-129

GRINNELL CORPORATION,

Petitioner,

vs.

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND, AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES OF THE STATE OF RHODE ISLAND,

Respondents.

JOINT MEMORANDUM IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

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JOINT MEMORANDUM IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

Respondents,[1] The Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce (hereafter collectively the "Chambers"), urge this

1. The Chambers, as appellants below, are respondents herein under Rule 21(4) of this Court. The Chambers have been permitted until August 15, 1973, to file a response to the cross-petitions for writs of certiorari filed by the State of Rhode Island and Grinnell Corporation.

Court to grant both of the captioned petitions for writs of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

QUESTIONS PRESENTED.

1. Whether, where state and federal legislation do not appear on their face to regulate the same activity, federal preemption may be found only where the state legislation palpably infringes upon federal policy *and* the federal interest is balanced against and found more compelling than the state interest?

2. What is the correct standard for determining whether the payment of a substantial state subsidy to striking employees obstructs the federal scheme of free collective bargaining?

SUPPLEMENTAL STATEMENT OF THE CASE.

In May, 1972, the Grinnell Corporation, then undergoing a strike by its employees affiliated with the United Steelworkers of America, filed suit in federal district court for a declaratory judgment and to enjoin the State[2] from continuing to pay unemployment compensation benefits to over 90% of its striking employees. The benefits, equal on average to over 70% of the employees' pre-strike take-home pay, were provided, pursuant to a uniform state policy, after the employees had met the requisite statutory waiting period.[3]

Recognizing the significant effect of such payments upon their memberships in the State of Rhode Island, the Chambers

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2. Both Petitioners, Mary C. Hackett and John J. Affleck, are officers of the State of Rhode Island, alleged to be acting pursuant to the laws of Rhode Island, and will be referred to herein as the "State."

3. See G. L. R. I. (1956), §§ 28-44-1 through 28-44-61, as amended.

intervened pursuant to Rule 24, F.R.C.P.[4] The Chambers asserted that the State's policy of providing strikers with substantial subsidies, in the form of unemployment compensation, prolongs strikes and/or increases the cost of collective bargaining agreements to employers, and that the effect of such payments was antithetical to the State's interests. On June 16, 1972, the District Court, after holding an evidentiary hearing on a motion for a preliminary injunction, sustained a motion to dismiss filed by the State. The court, refusing to make findings of fact as to the effect of the disputed policies upon collective bargaining, held: (1) that the payment of unemployment compensation benefits to strikers is an issue "appropriate for resolution by Congress, not by this Court"; and (2) that, despite Grinnell's and the Chambers' allegations of, as well as testimony to demonstrate, a frustration of federal policy, such state action was not prohibited by the Supremacy Clause because "[t]he State's interest is so substantial" that, as a matter of law, it cannot be precluded from granting strikers the disputed subsidies.

On appeal, the Court of Appeals for the First Circuit was "unable to affirm the District Court on either ground." Rhode Island's Pet., p. 17. The First Circuit, instead found the "preemption issue is justiciable;" however, rather than reversing that Court, the Court of Appeals remanded subject to an admittedly "unusual . . . insistence on an appropriate and detailed evidentiary basis . . .". Rhode Island's Pet., p. 34. The Court refused to conclude that collective bargaining is affected by the availability of the substantial payments to strikers and denigrated expert testimony that the payments of, or availability of, state

4. The U. S. Chamber, with a direct business membership in excess of 38,000 employers, and 3,700 state and local chambers of commerce, with an underlying membership of 5 million businesses and individuals, is the largest association of business and professional organizations in the United States. Similarly the Providence Chamber, an affiliate of the U. S. Chamber, is the largest association of employers in Rhode Island. Many are subject to the National Labor Relations Act, 29 U. S. C. § 141 *et seq.*

subsidies will "increase the propensity of a union to undertake strikes, . . . and the probability that they will be longer, costlier or both."[5] The First Circuit required, instead, that a complex " 'catalogue of data relevant to a macrocosmic weighing' " was required to be presented by the plaintiff to show a substantial frustration of federal policy. And, even assuming such frustration, a variety of "compelling state interests" (Rhode Island's Pet., p. 30), *e.g.*, economic hardship, local commercial stagnation, would validly justify such an instrusion on federal labor policy. The Court of Appeals recognized "the unusual nature" of its proposed means for deciding "the issue of federal policy." Rhode Island's Pet., p. 34. It concluded, however, that only in this manner could the "governing law of preemption" be applied to the circumstances of this case.

REASONS FOR GRANTING THE PETITIONS FOR WRITS OF CERTIORARI.

A. This Case Presents a Recurrent Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The recurring labor preemption problem of the past was articulating a rule from which the lower federal and state courts could determine the limits of their jurisdiction when dealing with labor related matters. See *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959) and *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971). The open issue which must now be determined—and an issue of similar magnitude[6]—is the permissible extent of the States' legislative pow-

5. Thieblot and Cowin, *Welfare and Strikes*, University of Pennsylvania Press (Phil. 1972), p. 217—Plaintiff's Exhibit 1 below. See also Dr. Thieblot's testimony that:

> "We find that there is something of a movement in the direction of the union eliminating strike benefits to workers who are going on welfare, and this in our view is tantamount to saying that the . . . public treasury is to some extent a major strike fund." App. Tr. 70, below.

6. See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337-1339 (1972): "From 1945 to 1960 no aspect of labor-

er, albeit perhaps directed at non-labor objectives, to modify the collective bargaining process. Admittedly, even prior to *Garmon*, this Court declared that:

> For a State to impinge on the area of labor combat designed to be free is quite as much an obstruction of Federal policy as if the State were to declare picketing free for purposes or by methods which the federal Act prohibits. *Garner* v. *Teamsters Union*, 346 U. S. 485, 500 (1953).

It is now necessary to determine specifically (1) what test must be satisfied to demonstrate such an impingement in the "area of labor combat;" and (2) which State interests, where such a test is satisfied, should be permitted to prevail and leave the "national system for the implementation of this country's labor policies . . . dependent on State law." *Nash* v. *Florida Industrial Commission*, 389 U. S. 235, 239 (1967). State subsidies to strikers, who would not otherwise receive such benefits but for their decision to strike, the issue here, typifies that problem and is a recurring subject of judicial controversy.[7] As such, the pending petitions are appropriate vehicles for this Court's formulation of a preemption standard to protect the uniformity of the national labor policy. Cf., *e.g.*, *McDonnell Douglas Corp.* v. *Green*, 93 S. Ct. 1817 (1973), where this Court de-

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management relations law gave rise to as much litigation and diversity of judicial opinion as the problems of fitting the basic federal labor legislation—the National Labor Relations Act, the Labor Management Relations Act and the Labor-Management Reporting and Disclosure Act—into the surrounding legal system. . . . Today the wind carries scent of change—or at least of reexamination. . . . The occasion seems ripe, therefore, for a review of the development of, and basic issues in, the law pertaining to federal occupation of the field of labor disputes.

7. See, e.g., *Super Tire Engineering Company* v. *McCorkle*, 469 F. 2d 911 (3rd Cir. 1972), *pet. for cert. pend.* No. 72-1554; *Lascaris* v. *Wyman*, ... N. Y. ..... (N. Y. Ct. of App. 1973), *pet. for cert. pend.* No. 72-1726; *The Dow Chemical Company* v. *Taylor*, ... F. Supp. ...., 57 F. R. D. 105 (D. C. E. D. Mich. *pend.*); *Francis* v. *Davidson*, 340 F. Supp. 351 (D. C. Md. 1972), *aff'd. per curiam* 404 U. S. 904 (1972); *I. T. T.* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970) *cert. den.* 402 U. S. 933, *pet. for reh. den.* 404 U. S. 824 (1971); *Russo* v. *Kirby*, 453 F. 2d 548 (2d Cir. 1971).

fined, in a similar procedural situation the applicable rules that should prevail in the retrial of a suit under Title VII of the 1964 Civil Rights Act. A formulation of the appropriate pre-emption test to govern the retrial of this case is equally necessary.

B. The First Circuit Has Misconstrued the "Governing Law of Preemption".

The First Circuit has, through the novel preemption approach utilized here, left the determination of the supremacy of federal policy largely dependent upon the financial resources of a plaintiff. This view severely distorts the important and recurrent area of federal preemption[8] and miscontrues the decisions of this Court.

The Court has heretofore required that, for a state "[t]o restrict either the objectives for which economic pressure can be applied [see *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283 (1959)], or the forms of pressure which are permissible [see *Teamsters, Local 20* v. *Morton*, 377 U. S. 252 (1964)] tips the scale towards management or union"[9] without regard to the state's objective, and is, therefore, impermissible. In neither situation, however, was any empirical evidence considered, let alone the "macrocosmic" and "complex" record required in this case by the First Circuit. In *Morton*, for instance, where this Court invalidated a state law even though the particular conduct it regulated was not arguably

8. Federal preemption cases engender considerable controversy and frequently necessitate review by this Court. See, e.g., from this Court's last term, *New York State Dept of Soc. Services* v. *Dublino*, ... U. S. ...., 41 U. S. L. W. 4925 (June 21, 1973); *Burbank* v. *Lockheed Air Terminal, Inc.*, ... U. S. ...., 41 U. S. L. W. 4600 (May 14, 1973). *U. S.* v. *Little Lake Misere Land Co.*, 453 F. 2d 360 (5th Cir. 1971), *cert. granted*, ... U. S. ...., 41 U. S. L. W. 3183 (Oct. 10, 1972); *Goldstein* v. *California, cert. granted*, ... U. S. ...., 40 U. S. L. W. 3568 (May 30, 1972). If new rules are to be formulated in this area, accordingly, they should be made by this Court and not a lower tribunal.

9. Cox, *op. cit.*, p. 1353.

proscribed or protected by federal law, the plaintiff was not required to demonstrate on any "macrocosmic" standard that its activities were an integral component in the bargaining process. This Court, indeed, has inferred, without evidence, that certain restraints have a "direct tendency to frustrate" federal policy and that financial pressure influences human conduct. *Nash* v. *Florida Industrial Commission*, 389 U. S. 235 (1967). Accord: *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. 390, 398; 208 N. E. 2d 516, 524 (1965). *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648, 654 (Del. 1967).[10] It is precisely that inference, however, which the court below refused to draw. The critical determinant now, accordingly, is the sheer practical and financial burdens of satisfying an empirical test: absent a plaintiff capable of incurring this burden the states are free to intrude substantially into the federal scheme. Such a radical restructuring of the sensitive area of state-federal relations warrants consideration by this Court. See *Perez* v. *Campbell*, 402 U. S. 637 (1971).

C. The Decision Below Threatens to Fragment the Cornerstone of Federal Labor Policy: the Collective Bargaining Process.

Notwithstanding the appropriate test to determine whether there is an obstruction to federal labor policy, to permit the amorphous variety of state interests considered by the First Circuit to prevail would open the collective bargaining process to frequent, and varying, intrusions by the States. The federal scheme provides for a "brute contest of economic power" (*N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. 477, 489 (1960)) which, it is submitted, Congress only can modify.

10. See, also the various cases in which publicity by state boards of conciliation has been held to be an impermissible intrusion, again without empirical evidence, upon the federally protected process of free collective bargaining. *General Electric Company* v. *Callahan*, 295 F. 2d 60 (1st Cir., 1960); *Oil Chemical & Atomic Workers* v. *Arkansas Louisiana Gas Co.*, 332 F. 2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich. 1966).

See, *e.g.*, the Food Stamp Act, 7 U. S. C. 2014(c).[11] Although the collective bargaining process has variegated, disruptive social side-effects, including short term economic hardships, Congress has nevertheless concluded that the "free opportunity for negotiation . . . is likely to promote industrial peace" (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937)) and the social welfare. See 29 U. S. C. §§ 141, 151. Accordingly, absent violence, which strikes at the very social order itself, such difficulties are insufficient to justify permitting State by State variations, under the guise of exercising a police power, in the balance struck by Congress.[12] See, *e.g.*, *Motor Coach Employees* v. *Missouri*, 374 U. S. 74, 80-81 (1963) where the use of "emergency legislation", passed "to protect the public from threatened breakdowns in vital community services", was prohibited. See also, *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648 (Del. 1967). The

11. See the most recent Congressional debates in the disbursement of food stamps to strikers, Vol. 119, Cong. Rec. H. 6322-6334 (July 19, 1973, daily ed.), in which Congress expressly considered all aspects of the question. No such Congressional consideration has ever been afforded the payment by the states of substantially higher unemployment compensation benefits. Here the benefits amounted to 72% of the strikers take-home pay.

12. Indeed in the instant case the fact that forty-eight states expressly exclude strikers from receiving unemployment compensation benefits is an impressive indication that the current Rhode Island policy sacrifices the general welfare in favor of the unions' welfare. Moreover, notwithstanding the real state interest, once it has been shown that the statute "stands as an obstacle to the full effectiveness of a federal statute . . ." (*The Colorado Anti-Discrimination Commission* v. *Continental Airlines*, 372 U. S. 714, 722 (1963)), or "clashes" directly or indirectly with the "objectives" of federal policy (*Sears, Roebuck and Co.* v. *Stiffel Co.*, 376 U. S. 225, 231 (1964)), the interference by the state is prohibited. Neither the similarity nor difference between the objectives of state and federal law (*Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 141-142 (1962); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955)) nor the "relative importance to the State of its own law is . . . material." *Free* v. *Bland*, 369 U. S. 663, 666 (1962). In sum, it does not matter "whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959).

First Circuit has, however, invited such variation in the national labor scheme. Such an invitation is a matter only for this Court.[13]

13. As the Committee on State Labor Law of the Section of Labor Relations Law of the American Bar Association stated in its 1972 Report: "The recent studies, along with the increased amount of litigation and the interest of numerous states in seeking a solution to this issue, suggest a need for some action. The present confusion on this issue has resulted in strikers being granted or denied public assistance on the basis of a particular state's interpretation of national labor policy or the state's interpretation of federal and state welfare legislation. It is doubtful whether the confusion on this issue will lessen in the year ahead and it would therefore be preferable to have the issue resolved on a uniform basis rather than perpetuate the current confusion. (footnotes omitted)." American Bar Association, Section of Labor Relations Law, 1972 Committee Reports, Vol. II, pp. 293-301.

CONCLUSION.

For each of the foregoing reasons the Chambers respectfully request that this Court grant both pending petitions for certiorari.

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